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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 753

KENNETH ROMNEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 408–416) has not yet been reported. The opinion of the district court overruling petition's motion for a directed verdict appears at pp. 315–318 of the record.

JURISDICTION

The judgment of the Court of Appeals was entered March 22, 1948 (R. 417). The petition for a writ of certiorari was filed April 20, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the fact that persons summoned for jury duty who wished to be excused were allowed to step aside until it was determined whether they would be needed constituted such error in the empaneling of the grand jury as to necessitate reversal of petitioner's conviction and dismissal of the indictment, even though no claim is made that the petit jury was improperly selected.

2. Whether a false report of the amount of cash in the hands of the Sergeant at Arms of the House of Representatives, made in statements of accounts current filed with the General Accounting Office, constitutes a misrepresentation as to a matter within the jurisdiction of an agency of the United States within the meaning of Section 35 of the Criminal Code.

3. Whether the fact that the trial judge smiled at the testimony of a witness constitutes prejudicial misconduct.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 15–20.

STATEMENT

An indictment in three counts was returned against petitioner in the United States District Court for the District of Columbia, each count charging a violation of Section 35 of the Criminal Code, 18 U. S. C. 80. The first and second counts,

each relating to a different date in 1946, charged that petitioner, as Sergeant at Arms of the House of Representatives, knowingly made false statements in a matter within the jurisdiction of an agency of the United States, the General Accounting Office, in that, in statements of the current account of the United States with the Sergeant at Arms, he knowingly overstated the amount of cash on hand by approximately $140,000 (R. 384–385). The third count charged that during the period from January 1 to October 31, 1946, petitioner, by trick, scheme, and device, knowingly concealed the fact that shortages existed in the account of the Sergeant at Arms by including as cash on hand, in his statements of accounts current, money known to have been stolen and forged and uncollectible checks (R. 385–386). Petitioner was convicted on all counts (R. 343) and he was sentenced generally to imprisonment for a period of from one to three years (R. 395). On appeal, the judgment was affirmed (R. 417).

The prosecution arose out of petitioner's conduct of his financial duties as Sergeant at Arms of the House of Representatives, a position which he held from 1931 to 1947 (R. 197). The House of Representatives, at the beginning of each session, appropriated money for the entire fiscal year for salaries and mileage of its members. This appropriation was credited on the books of the Treasury of the United States to the account

of the Sergeant at Arms, who each month drew a requisition on the Treasury for the full amount of the salaries of all the members of the House. See 2 U. S. C. 80, Appendix, *infra*, pp. 15–17. Individual checks were then drawn by the Sergeant at Arms on the Treasury to the order of those Congressmen who desired to receive their salary each month. For those who did not wish to receive their salary in this manner, accounts were maintained in the office of the Sergeant at Arms against which they were permitted to draw checks. (R. 164–172.)

Each month the Sergeant at Arms signed and filed with the General Accounting Office a statement headed, "The United States in Account Current With" the Sergeant at Arms; each such report contained spaces which were filled in showing the "Balance now due the United States" and 'Cash on hand' (Ex. 13, R. 43; Ex. 22–31, R. 102). Receipts for salaries and mileage accompanied these reports, which were delivered to the General Accounting Office each month (R. 36, 226). The monthly reports were made on a printed form, approved September 13, 1914 (prior to the establishment of the General Accounting Office), by the Comptroller of the Treasury. Account current reports in substantially the same form had been made monthly by the Sergeant at Arms' office as far back as 1900. (R. 199, 259–260.)

The account current reports were audited by the General Accounting Office, and when a dis-

crepancy was discovered in a report, the General Accounting Office would send someone to clear up the matter (R. 226, 259). Periodically, a certificate of settlement, covering the monthly accounts current, was issued by the General Accounting Office. One copy was sent to the Sergeant at Arms and one to the Speaker of the House. (R. 250, 259.)

Account current reports for each month from January through October 1946 were signed by petitioner and sent to the General Accounting Office (Ex. 13, R. 43; Ex. 22–31, R. 102).

Before his appointment as Sergeant at Arms, petitioner, who had been employed in that office, became involved in real estate transactions with former Congressman Smithwick, and had allowed Smithwick to "kite" checks through the office of the Sergeant at Arms (R. 97, 265–267). As Sergeant at Arms, petitioner held worthless checks drawn by Smithwick which, in his accounts to the General Accounting Office, he carried as cash on hand (R. 62–70, 82–90). In addition, after 1938, when petitioner discovered that one Frank Mahoney, an employee of the office, had embezzled $25,000 of office funds, he carried Mahoney's confession of embezzlement as cash, and treated the confession as cash in his reports of current account (R. 51–55). Several other bad checks by petitioner and others were also carried and reported as cash on hand (R. 56–62, 70–72, 269).

Petitioner offered no evidence in his defense (see R. 318–319) and the case was submitted to the jury without argument by either side (R. 319, 327).

ARGUMENT

1. On March 7, 1947, pursuant to leave of court, petitioner moved to dismiss the indictment on the ground that the grand jury had been illegally constituted (R. 386–387). In an affidavit in support of the motion, he alleged that he had been informed that when the names of persons summoned for jury duty were read on the roll call, each such person was asked whether he wished to be excused, and that those who did desire to be excused were told to step aside. About 50 persons did not ask to be excused. They were examined as to their qualifications, and a grand jury of 23 was selected. Of that number, 13 were government employees. (R. 387–388.)

By stipulation there was included in the record on appeal an excerpt from the remarks of the judge who presided at the time of the empaneling of the grand jury (R. 406–407). This transcript shows that, in the interest of expedition, the jurors who wished to be excused were told to step aside until it was determined whether it would be necessary to pass on their excuses, and that the presiding judge stated that he hoped that no one would ask to be excused unless he had a compelling reason therefor (R. 406–407).

Petitioner contends (Pet. 7–11) that this method of jury selection was so erroneous that his conviction must be reversed and the indictment dismissed. We submit, however, that the method by which the grand jury was selected constituted, at most, an irregularity which did not affect the representative character of the jury nor prejudice petitioner's substantial rights, and hence that the error is not such as would warrant reversal of petitioner's conviction and dismissal of the indictment.

No attack is made upon the method by which the prospective jurors were selected and summoned, and no suggestion is offered that any of the individual jurors actually selected was disqualified from serving. No showing is made that the jurors who asked to be excused belonged to any particular group or class, nor that they did not in fact have valid excuses which the court would in any event have honored.[1] It should be presumed, we think, that the persons summoned for jury duty followed the instructions of the presiding judge that they ask to be excused only if they really had a compelling reason. At most, therefore, petitioner has shown merely a possibility that, had a different method of procedure been followed, the jury might have been composed of

[1] Section 11–1419 of the District of Columbia Code, Appendix, *infra*, pp. 19–20, provides that a prospective juror may be excused "when for any reason his interests or those of the public might be materially injured by his attendance."

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different individuals. This Court has held that such a possibility does not constitute a showing of prejudicial error in the selection of a grand jury. In *Hyde* v. *United States,* 225 U. S. 347, 373, the method of empaneling a grand jury was challenged on the ground that the secretary of the jury commission had been allowed to take names out of the box and replace them as he pleased. This Court said, at page 374:

> * * * It is not shown that any juror was disqualified, nor is it shown that the grand jury was composed of jurors not selected by the commission. It is alleged, it is true, that names which had been put in the box by the commissioners had been taken out by Harstock, and that he put back those only that he deemed fit and proper. It follows, of course, from this that had all of the original names been in the box the grand jury might have been differently composed, but from this it cannot be inferred that injury or prejudice resulted to the defendants.

Until *Thiel* v. *The Southern Pacific Co.,* 328 U. S. 217, this Court followed the rule that where the persons actually chosen for jury duty were not shown to be disqualified, a challenge to the method of selection would not be sustained in the absence of a showing of prejudice. *Hyde* v. *United States, supra; Agnew* v. *United States,* 165 U. S. 36. In the *Thiel* case and in *Ballard* v. *United States,* 329 U. S. 187, this Court departed

from that rule and, in the exercise of its supervisory power over federal courts, reversed judgments because of errors in the method of selection of jurors, even though there was no showing of prejudice. In both of these cases, however, this Court found that the illegality of the manner of empaneling the jury resulted in the exclusion of a class and thus tended to undermine the representative, democratic character of the jury system.

The reasons for the exercise of such extraordinary power in those cases are not present here. As discussed, *supra,* petitioner has not shown that the method of excusing jurors resulted in any change in the representative character of the jury. Furthermore, the practice here challenged has, we are informed, been discontinued, so that reversal is not necessary to correct an existing evil.

In this case, the challenge to the method of selection of the jurors goes only to the selection of grand jurors, not petit jurors.[2] While we recognize that in the *Ballard* case, and in *Zap* v. *United States,* 330 U. S. 800, which followed it, indictments were dismissed because of defects in the method of selecting grand juries, we submit that, in determining whether to exercise the supervisory power of this Court to reverse a conviction in the absence of a showing of prejudice,

[2] In this respect this case differs from *Frazier* v. *United States*, No. 750, in which certiorari was granted on April 19, 1948.

this Court may properly take into consideration the fact that there is a very real practical difference between the function of a grand jury which merely accuses, and the function of a petit jury which determines the ultimate issue of guilt and innocence. Here, the error, if any, in the selection of the grand jury is not of a fundamental character and does not result in the exclusion of a class, as in the *Ballard* and *Zap* cases; no prejudice to petitioner resulting from the method of selection has been shown; petitioner has had a fair trial before a petit jury, properly selected; and guilt has been overwelmingly established, without dispute as to the facts. Such a case is not, we submit, one which would justify the exercise of the extraordinary supervisory power of this Court to reverse a conviction because of an irregularity in the empaneling of a grand jury. If there was error it was, under the circumstances of this case, clearly harmless, and reversal on the ground urged would be contrary to the mandates of Congress (18 U. S. C. 556; 28 U. S. C. 391) which have been incorporated in Rule 52 of the Federal Rules of Criminal Procedure.

2. Petitioner contends that as Sergeant at Arms he was not required to make reports to the General Accounting Office (Pet. 12–16), and that, even if he was, he was not required to account for the cash on hand representing salaries not paid out to those members of Congress who elected not to receive monthly checks (Pet. 17–24). On

this basis, he argues that the reports of cash on hand were not a matter within the jurisdiction of an agency of the United States, and therefore not a proper basis for prosecution under Section 35 of the Criminal Code (Pet. 24).

The short answer to petitioner's contentions is that, in all the years that he was in office, he undertook to make reports to the General Accounting Office showing the amount of cash on hand. Having undertaken to supply that information, he was under a duty to furnish it honestly and in good faith, and not falsely with intent to mislead. Having deliberately supplied false information to an agency of the United States, he is not now in a position to assert that such information was not material. See *United States* v. *Gilliland,* 312 U. S. 86, 93; *Kay* v. *United States,* 303 U. S. 1, 6; *United States* v. *Kapp,* 302 U. S. 214, 217–218.

In any event, as the opinion below makes clear (R. 411–415), there is no merit in petitioner's contentions. In 1890, after the Court of Claims had ruled that the Sergeant at Arms was a disbursing officer, although no statute expressly declared him to be such (*Crain* v. *United States,* 25 Ct. Cl. 204), Congress expressly declared that the Sergeant at Arms "shall be a disbursing officer." 2 U. S. C. 80, Appendix, *infra,* p. 16. Disbursing officers must render periodic accounts to the General Accounting Office. 31 U. S. C. 496, 497, Appendix, *infra,* pp. 18–19. Furthermore, the General

Accounting Office is expressly directed to receive and examine accounts relating to the House of Representatives and, according to the character of the account, to certify balances to the Clerk or the Sergeant at Arms. 31 U. S. C. 72, Appendix, *infra*, pp. 17–18. It is thus clear that the Sergeant at Arms is under a duty to submit statements of accounts current to the General Accounting Office.

As to petitioner's contention that, even if he was required to file accounts, he was not required to account for cash on hand, since that money belonged to the Representatives who elected not to receive regular salary checks, it is clear that the cash was held by him as a disbursing officer, and was not "disbursed" until it was actually paid out to the persons entitled to receive it. The only funds which he held were funds required by law to be paid to members of Congress for salaries and mileage. As the court below pointed out (R. 414), the act requiring a bond from the Sergeant at Arms, conditioned on "the faithful keeping, application, and disbursement of such moneys as may be drawn from the Treasury and paid to him as disbursing officer of the United States" (2 U. S. C. 82, Appendix, *infra*, pp. 16–17), would have been meaningless if it were not designed to apply to money held by the Sergeant at Arms for those members who did not receive regular salary checks.

As to petitioner's contention that, if the funds were public money, members of the House of

Representatives were in effect acquiescing in a violation of 31 U. S. C. 495, which provides that "disbursing officers having money in their possession not required for current expenditure, shall pay the same to the Treasurer, or some public depositary of the United States," it is clear that the section did contemplate that disbursing officers would hold money for current expenditures. In view of the long-established practice of keeping funds for members in the office of the Sergeant of Arms, it seems clear that the funds not paid to members entitled thereto were treated as money required for current expenditures.

3. An F. B. I. agent who interviewed petitioner testified that petitioner had told him that he had discussed the Mahoney defalcation with Representative Solomon, and that Solomon had suggested that the office hire someone to fill Mahoney's place, pay the new employee a lower salary, and use the difference to make up the shortage. Out of the hearing of the jury, counsel for petitioner stated that he had noticed that the judge had shaken his head and smiled at that testimony, and the judge admitted that he had smiled at the suggestion of Mr. Solomon (R. 271). Counsel thereupon moved for a mistrial (R. 272). Petitioner's contention that such action constituted an unfair comment on the evidence, depriving him of a fair trial (Pet. 24–25) is frivolous. There is no evidence that the jury saw the smile or that they interpreted it as a com-

ment on the evidence. The concealment of Mahoney's defalcations was only a minor part of petitioner's wrongdoing, all of which was overwhelmingly established by undisputed evidence. The action of the trial judge clearly did not constitute prejudicial misconduct.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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MAY 1948.

APPENDIX

Section 35 of the Criminal Code, as amended, 18 U. S. C. 80, provides:

> Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or office thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Act of October 1, 1890, c. 1256, 26 Stat. 645, as amended, 2 U. S. C. 78–82, provides in pertinent part:

It shall be the duty of the Sergeant at Arms of the House of Representatives to attend the House during its sittings, to maintain order under the direction of the Speaker, and, pending the election of a Speaker or Speaker pro tempore, under the direction of the Clerk, execute the commands of the House and all processes issued by authority thereof, directed to him by the Speaker, keep the accounts for the pay and mileage of Members and Delegates, and pay them as provided by law.

* * * * *

The moneys which have been, or may be, appropriated for the compensation and mileage of Members and Delegates shall be paid at the Treasury on requisitions drawn by the Sergeant at Arms of the House of Representatives, and shall be kept, disbursed, and accounted for by him according to law, and he shall be a disbursing officer, but he shall not be entitled to any compensation additional to the salary fixed by law.

The Sergeant at Arms shall, within twenty days after entering upon the duties of his office, and before receiving any portion of the moneys appropriated for the compensation or mileage of Members and Delegates, give a bond to the United States, with two or more sureties, to be approved by the Secretary of the Treasury in the sum of $50,000, with condition for the proper discharge of the duties of his office, and the faithful keeping, application, and disbursement of such moneys as may be drawn from the Treasury and paid to him as disbursing officer of the United States, and shall, from time to time, renew his official bond as the Secretary of the Treasury shall direct. No Member of Congress

shall be approved as surety on such bond. The bond given pursuant to this section shall be deposited in the office of the Secretary of the Treasury.

Act of July 31, 1894, c. 174, § 7, 28 Stat. 206, as amended, 31 U. S. C. 72, provides:

Accounts shall be examined as follows:

First: The General Accounting Office shall receive and examine all accounts of salaries and incidental expenses of the office of the Secretary of the Treasury and all bureaus and offices under his direction * * *.

Eighth: Said office shall receive and examine all accounts of salaries and incidental expenses of the offices of the Secretary of State, the Attorney General, and the Secretary of Agriculture, and of all bureaus and offices under their direction; all accounts relating to all other business within the jurisdiction of the Departments of State, Justice, and Agriculture; all accounts relating to the Foreign Service, the judiciary, United States courts, judgments of United States courts, Executive Office, Civil Service Commission, Interstate Commerce Commission, District of Columbia, Court of Claims and its judgments, Smithsonian Institution, Territorial governments, the Senate, the House of Representatives, the Public Printer, Library of Congress, Botanic Garden, and accounts of all boards, commissions, and establishments of the Government not within the jurisdiction of any of the executive departments. Said office shall certify the balances arising thereon, according to the character of the account, to the Secretary of the Senate, Clerk of the House of Representatives, Ser-

geant at Arms of the House of Representatives, or the chief officer of the executive department, commission, board, or establishment concerned.

R. S. § 3621, Act of May 28, 1896, c. 252, § 5, 29 Stat. 179, as amended, 31 U. S. C. 495, provides:

> Every person who shall have moneys of the United States in his hands or possession, and disbursing officers having moneys in their possession not required for current expenditure, shall pay the same to the Treasurer, or some public depositary of the United States, without delay, and in all cases within thirty days of their receipt. And the Treasurer or the public depositary shall issue duplicate receipts for the moneys so paid, transmitting forthwith the original to the Secretary of the Treasury, and delivering the duplicate to the depositor: *Provided,* that postal revenues and debts due to the Post Office Department shall be paid into the Treasury in the manner required by law.

R. S. § 3622, Act of February 27, 1877, c. 69, § 1, 19 Stat. 249, as amended, 31 U. S. C. 496, provides:

> Except as otherwise provided, every officer or agent of the United States who receives public money which he is not authorized to retain as salary, pay, or emolument, shall render his accounts monthly. Such accounts, with the vouchers necessary to the correct and prompt settlement thereof, shall be sent by mail, or otherwise, to the bureau to which they pertain, within ten days after the expiration of each successive month, and, after examination there, shall be passed to the General Ac-

counting Office for settlement. Disbursing officers of the Navy shall, however, render their accounts and vouchers direct to the General Accounting Office. In case of the nonreceipt at the General Accounting Office or proper bureau of any accounts within a reasonable and proper time thereafter, the officer whose accounts are in default shall be required to furnish satisfactory evidence of having complied with the provisions of this section. Nothing herein contained shall, however, be construed to restrain the heads of any of the departments from requiring such other returns or reports from the officer or agent, subject to the control of such heads of departments, as the public interest may require.

Act of August 30, 1890, c. 837, § 4, 26 Stat. 413, as amended, 31 U. S. C. 497, provides:

> All disbursing officers of the United States shall render their accounts quarterly; and the Secretary of the Senate shall render his accounts as otherwise provided; but the General Accounting Office may direct any or all such accounts to be rendered more frequently when in its judgment the public interests may require.

R. S. § 3623, 31 U. S. C. 498, provides:

> All officers, agents, or other persons, receiving public moneys shall render distinct accounts of the application thereof, according to the appropriation under which the same may have been advanced to them.

§ 11–1419, D. C. Code, 1940, provides:

> A person may be excused by the court from serving on a jury when for any

reason his interests or those of the public may be materially injured by his attendance, or when he is a party in any action or proceeding to be tried or determined by the intervention of a jury at the term for which he may be summoned, or where his own health or the death or sickness of a member of his family requires his absence.

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